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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

GRANT HOUSE, *et al.*,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, *et al.*,

Defendants.

No. 4:20-cv-03919 CW

**JOINT STIPULATION AND
[PROPOSED] ORDER CONCERNING
TESTIFYING EXPERT DISCOVERY**

TYMIR OLIVER, *et al.*,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, *et al.*,

Defendants.

No. 4:20-cv-04527 CW

1 WHEREAS, all parties desire to provide an efficient framework for the discovery of expert
2 witness-related materials; and

3 WHEREAS, all parties through their respective counsel of record have considered the expert
4 witness discovery provisions of Federal Rule of Civil Procedure 26 and agreed upon the proposed
5 modifications and supplementations described herein;

6 NOW THEREFORE, all parties, through their respective counsel of record, stipulate to the
7 following regarding expert discovery in the above-captioned matters and all other matters
8 subsequently consolidated with them (collectively, the “Actions”), subject to approval by the Court.

9 1. This Stipulation and Order Concerning Testifying Expert Discovery (“Stipulation”) does not set or alter the time for any disclosure required by Federal Rule of Civil Procedure
10 26(a)(2)(B) or the timing of any disclosure and deposition of any testifying expert as set forth in the
11 Joint Stipulated Case Management Order [Dkt. No. 127 in 4:20-cv-03919-CW and Dkt. No. 94 in
12 4:20-cv-04527-CW].

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14 2. To the extent this Stipulation imposes limitations on discovery that would otherwise
15 be available under the Federal Rules of Civil Procedure, including but not limited to Rule
16 26(b)(4)(C), the parties have agreed to those limitations to increase the efficiency of their dealings
17 with testifying experts and to minimize discovery disputes regarding testifying experts. Neither the
18 terms of this Stipulation nor the parties’ agreement to them shall be an admission by any party that
19 any of the information restricted from discovery by this Stipulation would otherwise be discoverable
20 or admissible. The term “expert” as used herein refers to a witness a party may use to present
21 evidence under Federal Rule of Evidence 702, 703, or 705.

22 3. The information required to be disclosed by Rule 26(a)(2)(B)(ii) is modified from
23 requiring “the facts or data considered by the witness in forming them” to instead require disclosure
24 of “the data or other information relied upon by the witness in forming them.”
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4. Except as provided in paragraph 5 below, the following information shall *not* be the subject of any form of discovery:

- a. The content of communications, whether oral or written, among and between:
 - (i) counsel and the expert and/or the expert's staff and/or supporting firms;
 - (ii) counsel and any non-testifying expert consultant and/or the consultant's staff and/or supporting firms;
 - (iii) the expert and other experts and/or other non-testifying expert consultants;
 - (iv) experts and their staff and/or supporting firms;
 - (v) non-testifying expert consultants and their staffs and/or supporting firms;
 - (vi) the respective staffs and/or supporting firms of experts or non-testifying expert consultants and the staffs and/or supporting firms of other experts or non-testifying expert consultants.
- b. Notes, drafts, written communications, preliminary or intermediate calculations, computations or other data runs, or other types of preliminary work created by, for, or at the direction of a testifying expert.

5. The limitations in paragraph 4 above shall:

- a. Not apply to any communications, documents, data sets, data runs, calculations, computations, or other forms of information or work upon which a testifying expert relies as a basis for any of his or her final opinion(s) or report(s).
- b. Not prevent an expert from being asked to identify and generally describe non-privileged information that may be relevant to the substance of the expert's

1 opinion(s) or report(s), including alternative investigations or modeling
 2 (including any regression analyses) that the expert attempted but rejected, and
 3 the reasons for rejecting any such investigations or modeling.

4 6. Subject to sub-paragraphs (a) and (b) below, within three business days of any party
 5 serving any expert report and/or expert declaration under Fed. R. Civ. P. 26(a)(2)(B), the party or
 6 parties proffering the expert witness shall produce: the data or other information relied upon by the
 7 expert witness in forming the expert witness's opinions; any exhibits used (or that will be used) to
 8 summarize or support the expert witness's opinions; the expert witness's qualifications, including a
 9 list of all publications authored in the previous 10 years; a list of all other cases in which, during the
 10 previous four years, the expert witness has testified as an expert at trial or by deposition; and a
 11 statement of the expert's hourly rate and compensation to be paid for the expert witness's study and
 12 testimony in this case.

13 a. As used in paragraphs 3, 6, and 8 of this Stipulation, "data or other
 14 information relied upon" shall be deemed to include, but will not be limited to,
 15 underlying data, spreadsheets, computerized regression analyses and/or other
 16 underlying reports, and schedules sufficient to reconstruct the expert witness's
 17 work, calculations, and/or analyses. "Data or other information relied upon"
 18 should be produced electronically (via email, disc, or FTP site) where feasible.
 19 Publicly available information need not be produced absent request so long as
 20 the information relied upon remains publicly available and the location where
 21 the publicly available information can be obtained is provided. Documents
 22 previously produced during discovery need not be produced so long as they
 23 are identified by Bates number.

24 b. All "data or other information relied upon" shall be provided in a format as
 25 agreed to by the parties, including, potentially, any software and instructions
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required to read “the data or other information relied upon,” but no party need produce computer software reasonably and commercially available (e.g., Microsoft Word, Excel).

7. To the extent that the specific stipulations agreed to herein limit or waive disclosure requirements under Fed. R. Civ. P. 26(a)(2)(B), the parties hereby confirm that they expressly agree to such waiver.

8. No subpoenas (for depositions or documents) need be served on any testifying expert from whom a report or declaration is provided. Instead, the party proffering such expert will (a) produce all “data or other information relied upon” by the expert, consistent with the terms of this Stipulation, and (b) make the expert available for deposition at a time mutually agreed to by the parties and consistent with the Court’s scheduling orders.

9. Nothing in this Stipulation shall permit a party or testifying expert to withhold any proposition, fact, belief, or other data, information, or material upon which the expert relies to support her or his opinion(s).

The parties agree to comply with this Stipulation and Order pending the Court’s approval.

Dated: December 11, 2020

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E-FILING ATTESTATION

I, Steve W. Berman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Steve W. Berman

STEVE W. BERMAN

* * *

[PROPOSED] ORDER

**PURSUANT TO STIPULATION,
IT IS SO ORDERED.**

DATED: _____, 2020

THE HON. CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE